In the Supreme Court
OF THE
United States

OCTOBER TERM 1956

No. 345

CHARLES ROWOLDT,
Petitioner,
vs.
J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

International Longshoremen's and Warehousemen's Union hereby respectfully moves for leave to file a brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained; the consent of the attorney for the respondent was requested but refused.

The interest of International Longshoremen's and Warehousemen's Union in this case arises from the fact that approximately 20 per cent of its members are foreign born and that some of them may be sub-

ject to deportation, as is the petitioner herein, if the judgment below is not reversed.

In the instant case in the Court of Appeals, and in its petition for certiorari here, petitioner argued primarily as to the applicability, to the facts of this case, of this Court's decision in *Galvan v. Press,* 347 U.S. 522, and barely mentioned the constitutional issues posed by a statute permitting deportation for long past and presumably innocent membership in the Communist Party. For understandable reasons, petitioner also barely argued that *Galvan v. Press* was erroneously decided and should be reversed. Since it is likely that petitioner may pursue the same course in its briefs on the merits, it is believed that the brief which amicus curiae is requesting permission to file contains a more complete argument upon the constitutional issues and upon the proposition that *Galvan v. Press* should be overruled. If this argument is accepted, it would be dispositive of the case.

Dated, San Francisco, California,
August 22, 1956.

Respectfully submitted,
NORMAN LEONARD,
Attorney for International Longshoremen's and Warehousemen's Union, Amicus Curiae.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

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BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE.

This Court in *Galvan v. Press*, 347 U.S. 522, held valid the provisions of the Internal Security Act of 1950, 64 Stat. 987, 1006. 1008, pursuant to which a lawfully resident alien was ordered deported solely for long past membership in the Communist Party.

It is the submission of amicus curiae that the statute is unconstitutional, that the *Galvan* decision

was erroneous, and that the grant of certiorari in this case provides an opportunity for the Court to correct its error and to strike down a patently unconstitutional statute. This Court hardly need be reminded that it has in the past overruled prior decisions when it has become convinced that they were erroneous. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379; *West Virginia v. Barnette,* 319 U.S. 624.

The statute involved, permitting as it does deportation[1] for long since past and (then) innocent conduct, without regard to evil intent or scienter on the part of the alien, fails to meet the constitutional tests on a number of grounds, any one of which requires a declaration of its invalidity.

1. Under prior decisions of this Court, a legislative act which penalizes political activities, legal when engaged in, is a bill of attainder and cannot withstand constitutional condemnation. If this is true of a bill denying compensation for services rendered (*United States v. Lovett,* 328 U.S. 303) or depriving one of the right to practice a profession (*Ex parte Garland,* 4 Wall. 333; *Cummings v. Missouri,* 4 Wall. 356), how much more so does it apply to a deportation statute?

2. It has also been held that the due process clause does not permit a statute to operate retrospectively without fair notice to those affected thereby. This principle is undoubtedly applicable to deportation

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[1]The awesome consequences of deportation have been noted by this Court so often as to make any extended citation of authority a work of supererogation. See, by way of example, *Ng Fung Ho v. White,* 259 U.S. 276; *Fong How Tan v. Phelan,* 333 U.S. 6, 10.

statutes. *Bugajewitz v. Adams,* 228 U.S. 585; *Jordan v. George,* 341 U.S. 223.

3. The statute's direct restraint upon the First Amendment rights of speech and assembly, is still another reason why it cannot stand, for that Amendment's guarantees apply to aliens as well as to citizens. *Bridges v. Wixon,* 326 U.S. 135. The clear and present danger test, even as enunciated in *Dennis v. United States,* 341 U.S. 494, is not met by a statute which penalizes ancient, remote and innocent past political activities. The failure of the statute to require proof of some probability of the occurrence of a substantive evil, from the continued presence of the alien, is fatal to its constitutionality.

4. To deport all persons who were at some time in the remote past, and for however short a period or however innocently, members of the Communist Party, is to establish an arbitrary and unreasonable classification which bears no relationship to any substantive evil against which Congress may legitimately legislate. The statute therefore offends not only the due process clause, but the equal protection clause, because of the lack of rationality in the classification which it sets up. It is thus outside the constitutional power of Congress. See *Hirabayashi v. United States,* 320 U.S. 81; *Korematsu v. United States,* 323 U.S. 214. Even in the field of deportation, no one would suggest that Congress could direct the deportation of all Jewish aliens or of all red-headed ones.

5. The failure to distinguish between innocent and knowing membership is arbitrary and unreasonable

and for this reason, too, the statute must be stricken down. *Wieman v. Updegraff,* 344 U.S. 183 and *Slochower v. Board of Education,* 350 U.S. 551.

There may yet be other constitutional vices in the statute under consideration, but certainly the foregoing are sufficient to require that it be stricken down.

In *Galvan,* however, this Court refused to do this, asserting that despite the force of the constitutional argument, the "slate is not clean". The Court suggested that because its earlier decisions had said that policies relating to aliens were "peculiarly" the concern of other branches of government, the judiciary must stay its hand. It is respectfully submitted that in this the Court fell into error.

Certainly the formulation of such policies is the concern of Congress. So is the formulation of policy in every other field of Federal legislative power. But it is nowhere written, either in the Constitution or out of it, that such or any policies may be formulated and enforced without regard to the constitutional limitations upon Congress. Certainly no power is more "political" or "sovereign" in this sense than the war power, and yet this Court in *Galvan,* citing *Hamilton v. Kentucky Distillers and Warehouse Co.,* 251 U.S. 146, recognized that it had long since imposed "substantive due process" limitations upon even that power. And a Court of Appeals has recently held, without further challenge from the government, that

"procedural due process" is a limitation upon the enforcement of policies relating to the "security" of the American merchant marine. *Parker v. Lester,* 227 Fed.2d 708 (9 Cir.). Other examples may be multiplied, but the significance to the present argument is not the number of cases which may be cited, but the recognition of the fundamental principle that Congress, like every other branch of government, not only has merely limited, delegated powers, but that such powers as it does have are themselves circumscribed by the terms of the Constitution. That is to say, Congress' powers in any field are subordinate to, and not superior to, the provisions of the Constitution, including the prohibitions of the Bill of Rights and the Fourteenth Amendment. Those prohibitions as we have seen, are indubitably breached by the statute under consideration.

Nor is there anything in the "slate" referred to in *Galvan* which precludes this Court from carrying out its constitutional duty to declare this legislation invalid. The mere fact that a statute deals with aliens has never prevented this Court from exercising the constitutional duty enunciated as long ago as *Marbury v. Madison,* 1 Cranch 137, of keeping other branches of government within the bounds of the Constitution. Cf. *Bridges v. Wixon,* 326 U.S. 135; *Kessler v. Strecker,* 307 U.S. 22; *U. S. ex rel. Tisi v. Tod,* 264 U.S. 131.

CONCLUSION.

What this case presents, therefore, is the simple question of whether, merely because it is aliens who are the subject matter of legislation, Congress' power is untrammeled by the Constitution. We submit that our theory of the Constitution does not permit such a result, and that this Court erred in so holding in *Galvan v. Press.* We urge that the legislation in question be reviewed in the light of the constitutional standards otherwise applicable, and that thereupon it be stricken down, and that the judgment below be reversed.

Dated, San Francisco, California,
August 22, 1956.

Respectfully submitted,
NORMAN LEONARD,
Attorney for International Longshoremen's and Warehousemen's Union, Amicus Curiae.

GLADSTEIN, ANDERSEN, LEONARD
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Of Counsel.